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IN THE

Supreme Court of the United States

October Term, 1962

No. 455

FAYE LYONS,
Petitioner,

vs.

ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254(1), U.S. Codes; 62 Stats. 926. The judgment of the United States Court of Appeals was rendered

June 1, 1962. On petition for rehearing, duly and regularly filed, the petition for rehearing was denied June 28, 1962. Petition for certiorari is filed within 90 days after the denial of said petition for rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals is recorded in *Lyons v. Gilliland,* 303 F. 2d 452. A previous decision in the same case was affirmed in *Gilliland v. Lyons,* 278 F. 2d 56.

STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, Section 1254(1), U.S. Codes:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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Section 45, Civil Code of California:

Libel, What. Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Section 47, Civil Code of California:

Privileged publication or broadcast.

A privileged publication or broadcast is one made —

1. In the proper discharge of an official duty.

2. In any (1) legislative or (2) judicial proceedings, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

Section 48, Civil Code of California:

Privileged publication or broadcast; malice not inferred.

In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication.

STATEMENT OF THE CASE

QUESTIONS PRESENTED

1. Where a woman is libeled in a State divorce action in the State of California by being falsely charged with adultery in the suit filed in the State court, can she be denied damages in a federal court in a diversity of citizenship case where the charge of adultery in the State divorce action is found to be false, but further found to be privileged on information which was claimed to have been received subsequent to the filing of the libelous document?

2. Whether the person who commits the libel is bound by her knowledge or lack of knowledge at the time of the false publication in the divorce action.

3. Whether the person committing the libel can rely on information or statements or beliefs unknown to her at the time of and prior to the commission of the libel but was only acquired subsequent thereto.

4. Whether the law of the State of California which provides that in an action for divorce allegations of adultery are not privileged communications as to

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the person making such allegation unless made without malice by one having reasonable and probable cause for believing the truth of such allegations at the time of making it and publishing it governs this case.

5. Whether a decision of a U.S. Court of Appeals, in affirming an order in this case granting a new trial after a first trial, became the law of the case so that in the second trial of the action in the district court, the district court and jury are bound by it.

6. Whether the rule of *Erie v. Tompkins,* 304 U.S. 64, 82 L.ed. 1188, is binding in this case and requires the federal court to apply the law of the State of California as construed by the highest courts of that State.

Davis v. Hearst, 160 Cal. 143;
Koenigstein v. Koenigstein, 53 Cal. App. 673;
Hartshorn v. Hartshorn, 67 Okla. 45;
State v. Eggleston, 45 Ore. 346;
Wilson v. Wilson, 124 Cal. App. 655.

7. Whether a plaintiff who has been falsely charged with adultery in a divorce action is denied due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the U.S. Constitution in a diversity suit brought in a federal court where there is a finding that the accusation of adultery was false but nevertheless that it was privileged.

8. Whether section 47 of the Civil Code of the State of California, inherently and as construed and applied in this case, violates due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

9. When privilege is pleaded as a defense in a libel action are matters unknown to the libellant at the time of the libel available as evidence to sustain the burden of proving probable cause or must proof of probable cause consist only of matters known to the libellant at the time of the libel.

10. Whether a decision of a Court of Appeals, based upon erroneous statements of fact, must be reviewed by this Court where the matters and purported quotations in the decision are not based upon a correct reading of the record or the facts produced at the trial.

11. Whether this Court should review a decision of a court of appeals where the court of appeals has acted under a mistake of fact and has refused and declined to correct its decision based upon those erroneous facts.

Defendant Elsinore Machris Gilliland, a wealthy oil heiress and owner of several oil wells in Southern California, sued her much younger husband for divorce in the Superior Court of the State of California. In the action she charged Faye Lyons, a resident of Florida, with adultery. The record in the case discloses that at the time of the making of the allegations and the filing of the divorce action, she had no information justifying her in making this false allegation. The case was tried before a jury and a verdict was rendered in favor of the defendant, but the trial judge granted a motion for a new trial from this verdict. Thereafter the defendant pleaded truth and privilege as her defenses in the action, and a second trial was held.

In the first appeal, in which there was a complete record before the Court of Appeals, the Court of Appeals stated, in affirming the order granting a new trial (*Gilliland v. Lyons,* 278 F. 2d 56),

> "The ultimate basis for the order granting the new trial then would be the lack of sufficient evidence to establish good faith and lack of malice as required by the statute."

The statute referred to was section 47 of the Civil Code of California. On the retrial the issues of truth and privilege were placed before the jury. The jury found the libelous statement untrue but it also found that it was privileged. The same evidence on the ques-

tion of privilege was given on both trials. The second judgment was affirmed on appeal by a different panel of the circuit court of appeal, the decision holding that the same evidence which would not support a defense of privilege on the first appeal would support the same defense on the second appeal. The second learned panel, in citing the decision incorrectly purports to quote from a statement of Blanche Lampert. (Plaintiff's Exhibit 1.) The quotation is not contained, however, in the statement as quoted. The affirmance of the judgment is therefore incorrectly based upon this misstatement of facts, as the record shows that the defendant was not aware of these facts at the time of swearing to the complaint and filing the libelous action. The court of appeals, therefore, affirmed the judgment in the second case based upon a misstatement of fact and a misstatement of the record. The court is asked to grant certiorari to correct such mistake as well as a conflict in the opinions of two branches of the same court.

REASONS FOR GRANTING THE WRIT

1. The case is at variance with the law of the State of California which holds that only matters known to a libellant at the time of the libel are available on the defense of privilege.

Davis v. Hearst, 160 Cal. 143;
Koenigstein v. Koenigstein, 53 Cal. App. 673;
Hartshorn v. Hartshorn, 67 Okla. 45;
State v. Eggleston, 45 Ore. 346;
Wilson v. Wilson, 124 Cal. App. 655.

The Court of Appeals in its later decision holds that the matters learned later and after the libel was filed are available to her as a defense and this is contrary to the law of the State of California and the law generally.

2. This case is at variance with established law that proof of adultery by inference cannot be shown except by proof of opportunity and proof of propensity on the part of *both* parties to commit the act. The Court of Appeals, in conflict with the law of the State of California and in conflict with general law, erroneously holds that proof of propensity by one only of the parties, plus opportunity, will support a legal inference of adultery. This establishes a new and unique rule contrary to the law of the State of California and destroys the normal protection of the law to the innocent who would be subject to such false accusation.

3. Where a court acts under a mistake of fact, a higher court will review it and correct the same or will recall the remittitur or mandate so that justice may be done. (*People v. Rothrock,* 14 Cal. 2d 34) This case should be reviewed so as to correct the mistake of misquoting documents which form the justification and support of the decision and make it erroneous. This Court will not permit a decision to stand which is based upon statements which purport to be facts but which are incorrect. The rule that proof of adultery by inference can only be shown by (1) proof of opportunity and (2) proof of propensity on the part of both parties is held in the following cases:

Davis v. Hearst, 160 Cal. 143;
Koenigstein v. Koenigstein, 53 Cal. App. 673;
Hartshorn v. Hartshorn, 67 Okla. 45;
State v. Eggleston, 45 Ore. 346;
Wilson v. Wilson 124 Cal. App. 655.

As evidence of how the court of appeals acted under a mistake of fact and that the decision is based upon such a mistake of fact, we respectfully point to the following language in the decision of the court of appeals. That decision purports to quote from the Blanche Lampert statement, a sworn statement of a witness called on behalf of the defendant, which is as follows:

> "Stayed with appellant all night at the Paradise Valley Guest Ranch."

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The words of the statement were as follows:

> "Stayed at Paradise Valley Guest Ranch when appellant was there."

Surely if some Justice stayed at a guest ranch when some woman or women were there it would not constitute staying with them and this glaring mistake of fact is set forth in support of the opinion of the court of appeals.

A virtuous woman may stay in a certain hotel while a known lecher is also a guest in the same hotel. These facts do not justify the libel that the virtuous woman stayed with the lecherous individual in a certain hotel.

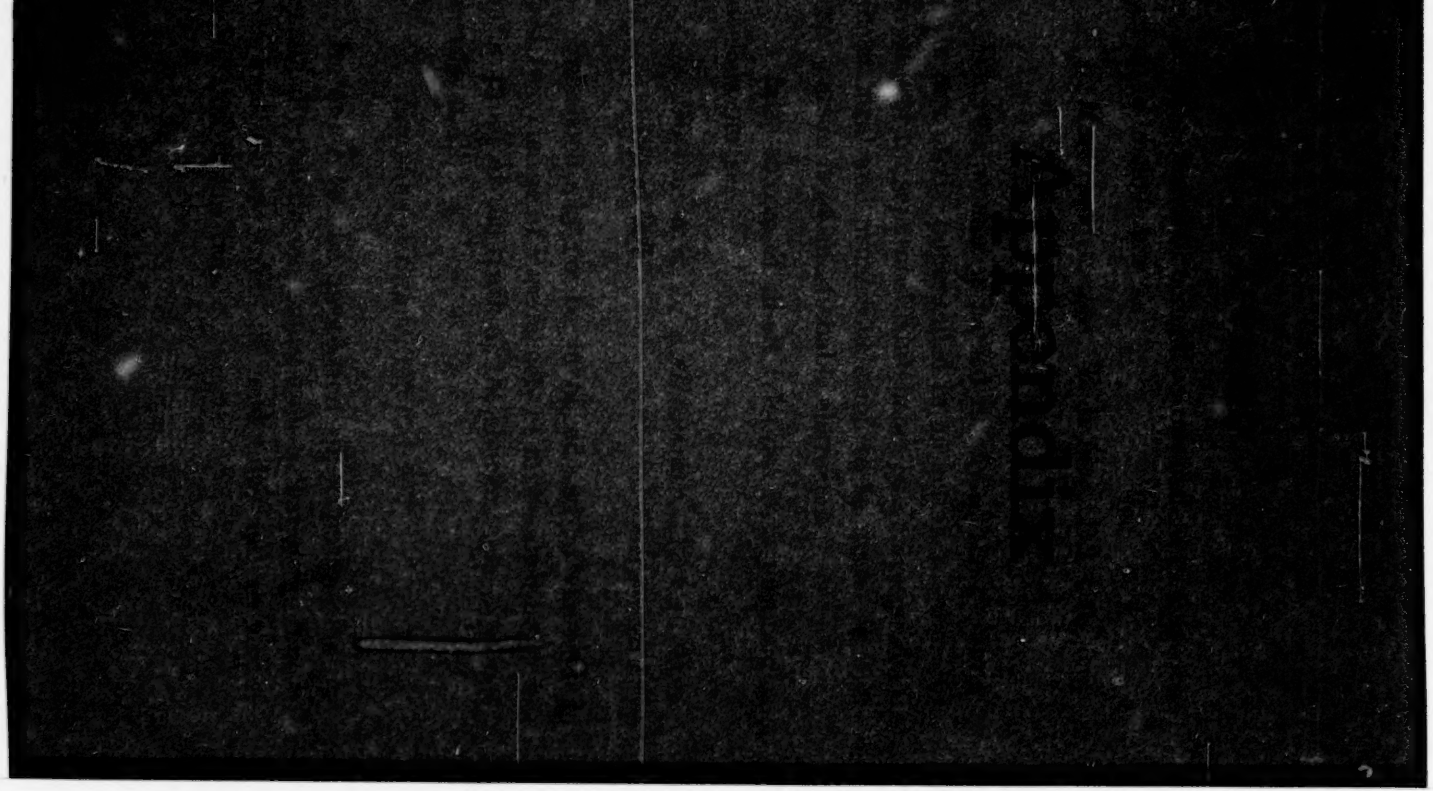
Three times in the decision of the court of appeals there is quoted evidence which was not known to the libellant at the time of the libel and this evidence, not known to the libellant at the time of the libel, is quoted as a basis for and in support of its decision on the issue of privilege. This is all in violation of established law and should be corrected by this Honorable Court under its doctrine of *Erie v. Tompkins,* 304 US 64, 82 L.ed. 1188. Section 47 of the Civil Code of California, inherently and as construed and applied in this case, would violate both due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States if it was allowed to deny damages on the basis of privilege in the federal court to one who had been

falsely accused of adultery in a divorce action by one having no basis for the accusation at the time it is made. Such a decision should not be allowed to stand.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of the Court, directed to the United States Court of Appeals for the Ninth Circuit, to reverse the case and remand the same solely for determination of the damages done to the libellant and for such other and further relief in the premises as may seem just and meet.

Respectfully submitted,

MORRIS LAVINE and
WELBURN MAYOCK
Attorneys for Petitioner



APPENDIX

A false charge of being a co-respondent in a divorce action is libelous per se.

Mortonsen v. L.A. Examiner, 112 Cal. App. 196 at 207

Where a woman is named in any of the pleadings or in any of the papers filed in an action whether for divorce or for separate maintenance as a co-respondent, the natural and usual conclusion to be drawn is that such person is of questionable character.

A false charge of illicit relations in a pleading is libelous per se.

Mortonsen v. L. A. Examiner, 112 Cal. App. 196 at 207

Falsehood may not be published and he who would justify a charge of specific acts of misconduct must do so by proof of the truth of the charge or he does not justify at all.

Dauphny v. Buhne, 153 Cal. 757

In order to the protection of a publication as qualifiedly privileged it must appear that at the time it was made it was made in good faith and in honest belief that it was true.

Swan v. Tappan, 5 Cushing (Mass.) 104;
Gossett v. Gilbert, 6 Gray (Mass.) 94;
Clink v. Colby, 46 N.Y. 427, 7 Amer. Rep. 360;
Quinn v. Scott, 22 Minn. 456.

Whatever a man publishes, he publishes at his peril.

Peck v. Tribune Co., 214 U.S. 189, 53 L. ed. 960;
Washington Post Co. v. Chaloner, 250 U.S. 293.

A person can never escape liability for making an untrue defamatory statement of another with malice and without probable cause.

Where one seeking a divorce names another person as the alleged paramour of her husband, the circumstances surrounding it lead to the inference of malice and lack of good faith at the time of the publication.

Faye LYONS, Appellant,

v.

Elsinore C. Machris GILLILAND, also known as Elsinore Machris Gilliland, Appellee.

No. 17362.

United States Court of Appeals
Ninth Circuit
June 1, 1962.

Rehearing Denied July 9, 1962.

Action for libel. The United States District Court for the Southern District of California, Central Division, William C. Mathes, J., entered a judgment for the defendant and the plaintiff appealed. The Court of Appeals held that where a libelous per se charge was made against plaintiff by defendant in her divorce action and evidence sustained jury findings that defendant had acted without malice and had reasonable and probable cause for believing truth of relevant allegations, words which were published only in a judicial proceeding were privileged.

Affirmed.

1. Libel and Slander 7(17)

Publication charging that plaintiff committed acts of adultery with another was libelous per se.

2. Libel and Slander 112(2)

Evidence supported jury finding that defendant's charge of adultery, made in divorce proceeding, was without malice.

3. Courts 406.3(5)
Federal Civil Procedure 2651

Jury finding is binding on trial court and appellate court unless there is no substantial evidence, whether contradicted or not, to support verdict.

4. Libel and Slander 112(2)

Evidence sustained jury finding that defendant had probable cause to believe truth of her allegation in divorce action that her then husband had committed adultery with plaintiff.

5. Libel and Slander 38(3)

Where libelous per se charge was made against plaintiff by defendant in her divorce action and evidence sustained jury findings that defendant had acted without malice and had reasonable and probable cause for believing truth of relevant allegation, words which were published only in a judicial proceeding were privileged. *West's Ann.Cal.Civ.Code* §47, subd. 2.

Welburn, Mayock and W. S. Mayock, Los Angeles, Cal., for appellant.

Charles W. Wolfe and George R. Larwill, Los Angeles, Cal., for appellee.

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Before BARNES, HAMLEY and BROWNING, Circuit Judges.

PER CURIAM.

This is an appeal by plaintiff in a diversity action for libel from a judgment based on a jury verdict, holding that the libel charged was untrue, but that its publication was privileged.

[1] The libel charged appellant with acts of adultery committed with appellee's then husband. The words were libelous per se, and their publication admitted in a cross-complaint in a divorce action. Their alleged privilege rests upon their publication *only* in a judicial proceeding. Section 47 of the Civil Code of California reads, in pertinent part, as follows:

"47. [Privileged publication * * *: What constitutes]

"A privileged publication * * * is one made— * * *

2. In any * * * judicial proceeding * * *; provided, that an allegation or averment contained in any pleading * * * in an action for divorce * * * made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication * * * as to the person making said allegation or averment within the meaning of this section unless such pleading be verified * * * and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation * * * and unless such allegation * * * be material and relevant to the issues in such action. * * * "

Materiality and relevancy are undisputed. Appellant's real thrust on this appeal is that there was insufficient evidence that appellee acted without malice, or had reasonable and probable cause for believing the truth of the allegations.

[2, 3] Appellee testified she acted without malice. Appellant argues that wronged wives seldom admit, but almost universally have, "hatred, jealousy and even vindictiveness" against the other woman. This may well be true. If so, it presented a conflict in the evidence. That conflict was for a jury's determination, and solely for a jury's determination. That determination has been made and under well known legal rules is binding on the trial court, and on this court, unless there is *no* substantial evidence, whether contradicted or not, to support the jury verdict. Such a total lack of evidence does not exist in the facts of this case.

We next consider the alleged lack of probable cause for appellee to believe the truth of her allegations. Only evidence known by appellee at the time of publication can be now considered.

When she filed her cross-complaint, Mrs. Gilliland knew the contents of the so-called Lambert statement, plus what her attorney, Mr. Murphey, knew,[1] plus, perhaps, a little the neighbors told her. The appellee filed

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[1]Mrs. Lambert stated at the trial she had given Mr. Murphey a sworn statement "of the girls who stayed there and what they did, the same as I gave on the stand." (Tr. p. 235.)

her cross-complaint alleging adultery only after receiving her attorney's advice that she had sufficient evi dence to charge adultery.

We need not go into all the details here; a few suffice. Mrs. Lambert referred to Mr. Gilliland's "keeping" appellant (a twice married adult) at Paradise Valley Motel; "staying all night up there himself"; appellant coming to Mr. Gilliland's home and staying until two or three o'clock in the morning; their drinking together; that the two kissed on several occasions before Mrs. Lambert; that appellant and Mr. Gilliland took a ten day automobile trip from Scottsdale, Arizona, to Miami, Florida, together; and that on the one occasion Mr. Gilliland "stayed with appellant all night at the Paradise Valley Guest Ranch" Mrs. Lambert saw Mr. Gilliland leave Faye Lyons' room at 7:45 A.M. the next morning.

Of lesser importance, but to set the stage for the foregoing, there was evidence of drinking, arguments, quarreling and fighting, and on at least one occasion, articles being thrown. Mrs. Gilliland knew of her husband's boast of his conquests of other women; and that he had variously entertained other women — one for three weeks as a house guest.

[4, 5] Under these circumstances, we cannot say, as a matter of law, there was an absolute lack of substantial evidence from which the jury might not have concluded that Mrs. Gilliland was justified in inferring

and charging her husband in a court of law of adultery committed with Faye Lyons, or that such a conclusion had no legal basis in fact.

Affirmed.

Elsinore M. Machris GILLILAND, also known as Elsinore Machris Gilliland, Appellant,

v.

Faye LYONS, Appellee.

No. 16385.

United States Court of Appeals
Ninth Circuit.
April 11, 1960.

Defamation action. After making findings adverse to the plaintiff on all three causes, the United States District Court for the Southern District of California, Central Division, William C. Mathes, J., granted a new trial to plaintiff on one of the causes and the defendant appealed. The Court of Appeals, Koelsch, Circuit Judge, held that where plaintiff timely filed a motion for new trial within ten-day period provided by rules and court granted motion after ten-day period without specifying reasons therefor other than that plaintiff's motion was granted, under the circumstances, court had jurisdiction to issue order and it was not appealable.

Appeal dismissed.

1. Courts 405(12.17)

As general rule, order granting motion for new trial is not appealable because it is not "final" within meaning of statute giving Courts of Appeals jurisdiction of appeals from final decisions, but it is interlocutory. 28 U.S.C.A. § 1291.

2. Courts 406.1(12)

Rule that order granting new trial can be reviewed on appeal from subsequent judgment exists but rule is not unqualified and trial court must have had jurisdiction to make order for it to be reviewable. 28 U.S.C.A. § 1291.

3. Federal Civil Procedure 2376

If trial court lacked jurisdiction to make order granting new trial, in doing so it acted without power and was incapable of destroying finality of its own judgment. 28 U.S.C.A. § 1291; Fed. Rules Civ. Proc. rule 59(d), 28 U.S.C.A.

4. Courts 405(3.15)

Where motion for new trial is made within 10-day period required by rules and is granted, it is not appealable, even though order granting it is issued subsequent to that period, but conversely when order granting new trial is issued by trial court on its own initiative after ten-day period has run, the order is appealable. 28 U.S.C.A. § 1291; Fed. Rules Civ.Proc. rule 59(d), 28 U.S.C.A.

5. Federal Civil Procedure 2368

As a general rule, no reasons for granting new trial are required but grounds are obtained from those stated in motion itself. Fed.Rules Civ.Proc. rule 59(b, d), 28 U.S.C.A.

6. Courts 405 (3.15)

Where plaintiff against whom findings were made on all three of her causes in defamation suit timely filed a motion for new trial within ten-day period provided by rules and court granted motion after ten-day period without specifying reasons therefor other than plaintiff's motion was granted, under the circumstances, court had jurisdiction to issue order and it was not appealable. 28 U.S.C.A. §§ 1291, 1332; Fed.Rules Civ.Proc. rules 7(b), 59(b, d), 28 U.S.C.A.; West's Ann.Cal.Civ.Code, § 47, subd. 2. (2, 3).

Wm. L. Murphey, John B. Anson, Charles Wolfe, Los Angeles, Cal., for appellant.

Welburn Mayock, Morris Lavine, Los Angeles, Cal., for appellee.

Before STEPHENS, BARNES and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge.

Appellee filed an amended complaint on November 20, 1956, in the United States District Court stating three separate causes of action. The ground as to each cause of action was, in substance, as follows: number

one, that appellant had published false, malicious and slanderous statements concerning appellee's adulterous relationship with appellant's husband; number 2, that appellant had falsely and maliciously published a verified cross-complaint on November 26, 1955, in a divorce proceeding against her husband charging appellee with adultery; and number 3, that appellant had caused a newspaper article to be published on March 23, 1956, reciting the allegations in the above complaint. Appellant's answer, in addition to denying the above allegations, set up an affirmative defense of truth as to the first and third causes of action, and an affirmative defense of privilege as to the second cause of action.

The District Court, sitting without a jury, entered Findings of Fact and Conclusions of Law favorable to appellant on all three causes of action. The court ruled, however, that since appellant did not raise the "specific defense" of truth in the second cause of action, no finding would be made in regard thereto. Judgment for appellant was entered on June 17, 1958. Appellee filed a timely motion for a new trial on June 24, 1958. The grounds for this motion were as follows:

"I

"Irregularity in the Pre-Trial Proceedings by the elimination of 'truth' as to the slanders and libels from the case when 'falsity' had been pleaded by the plaintiff and denied by the defendant;

"II

"Accident at the trial in the failure by inadvertence and excusable neglect on the part of the plaintiff's attorney to introduce defendant's deposition in evidence;

"III

"Insufficiency of the evidence to justify the decision. The following specifications are urged:

* * * * * * * *

"D. Finding VII [regarding the second cause of action] is opposed to the weight of substantial and probative evidence in that there is no evidence * * * to support the finding that she acted in 'good faith' and 'without malice' and reasonably believed the allegations were true * * * "

Thereafter, on September 30, 1958, the Court granted the motion in part by the following order:

"It is Ordered that plaintiff's motion for a new trial is hereby granted as to plaintiff's second claim or cause of action only, and that in all other respects the motion for a new trial is hereby denied. See: Cal.Civ.Code Sec. 47-2(3); *Davis v. Hearst*, 1911, 160 Cal. 143, 195, 116 P. 530, 552; *Tingley v. Times Mirror Co.*, 1907, 151 Cal. 1, 26, 89 P. 1097, 1107."

The present appeal is taken from the above order. Jurisdiction of the District Court was based on diversity of citizenship under 28 U.S.C. § 1332. Whether this court has jurisdiction is the determinative and controlling question in this appeal.

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Appellee contends that an order granting a motion for a new trial is not appealable under 28 U.S.C. § 1291, and that therefore this court is without jurisdiction to decide the matter. Appellant argues that the lower court had no jurisdiction to issue the order because it was made on the court's own initiative and not within the requisite ten-day period prescribed by Rule 59(d), Federal Rules of Civil Procedure, 28 U.S.C.[1] Appellant then urges that such orders, because lacking in necessary jurisdictional power, are appealable.

[1, 2] As a general rule, an order granting a motion for a new trial is not appealable because it is not a "final" order under 28 U.S.C. § 1291. *Phillips v. Negley,* 1886, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013; *Long v. Davis,* 9 Cir., 1948, 169 F.2d 982. The order is interlocutory since it destroys the finality of the judgment and there is no "final decision" from which an appeal will lie. *Libby, McNeill & Libby v. Malmskold,* 9 Cir., 1940, 115 F.2d 786. The order granting a new trial can be "reviewed" on an appeal from a subsequent judgment. *Pettingill v. Fuller,* 2 Cir. 1939, 107 F.2d 933; *United States v. Hayes,* 9 Cir., 1944, 172 F.2d 677.

[3] However, this rule is not unqualified: the trial court must have had jurisdiction to make the order; if not, it was acting without power and was therefore in-

[1]Rule 59(d), Federal Rules of Civil Procedure, provides as follows:

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

capable of destroying the finality of its own judgment. *Freid v. McGrath,* 1942, 76 U.S. App. D.C. 388, 133 F. 2d 350; *Kanatser v. Chrysler Corp.,* 10 Cir., 1952, 199 F. 2d 610. An order made without jurisdiction is considered final and appealable:

> "An order granting or refusing a new trial, which the court has the jurisdiction or power to make, is discretionary, and cannot be reviewed. * * * But the question whether or not the court had the jurisdiction or power to make an order granting or refusing a new trial and avoiding a former judgment is always reviewable in the federal courts * * * because it goes to the effect and finality of the judgment itself. *City of Manning v. German Insurance Co.,* 8 Cir., 1901, 107 F. 52, 54."

[4] It is clear, therefore, that when a motion for a new trial is made within the ten-day period required under Rule 59(b),[2] and the motion is granted, it is not appealable even though the order granting it is issued subsequent to that period. *Citizens National Bank of Lubbock v. Speer,* 5 Cir., 1955, 220 F.2d 889. Conversely, when an order granting a new trial is issued by the court on its own initiative after the ten-day period has run under Rule 59(d), the order is appealable. *Freid v. McGrath,* supra; *Phillips v. Negley,* supra. The problem arises, however, where a timely motion is filed,

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[2]Rule 59(b), Federal Rules of Civil Procedure, provides as follows:

"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

and the court grants the motion after the ten-day period on a ground not stated therein. In those appellate courts where the question has arisen, the order has been construed to arise from the court's own initiative, without jurisdiction, and therefore appealable. *Freid v. McGrath,* supra; *Marshall's U. S. Auto Supply v. Cashman,* 10 Cir., 1940, 111 F.2d 140; *National Farmers Union Auto & Cas. Co v. Wood,* 10 Cir., 1953, 207 F. 2d 659.[3]

[5, 6] Our primary inquiry, then, is whether the lower court's order was made on grounds stated in the motion or on its own initiative. The order, quoted above, does not specify any reasons for granting a new trial other than "* * * plaintiff's motion for a new trial is hereby granted * * *." As a general rule, no reasons are required; the grounds for the motion are obtained from those stated in the motion itself.[4] The above language alone would be sufficient to establish the lower court's jurisdiction as based upon appellee's motion rather than the court's own initiative. In

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3. This court has not as yet passed on the question. See *Southern Pac. Co. v. United States District Court,* 9 Cir., 1951, 190 F.2d 735; *Grimm v. California Spray-Chemical Corp.,* 9 Cir., 1959, 264 F.2d 145. However, Prof. Moore, in his work on Federal Practice, disagrees with the rationale in *Freid v. McGrath, supra,* on the ground that "* * * once finality has been suspended, there is nothing in the policy underlying Rule 59(d) to prevent the trial court from exercising its discretion to grant the motion on grounds which it deems just." Moore, Federal Practice, Vol. 6, §5909 (2).

4Rule 7(b), Federal Rules of Civil Procedure, requires that motions made after the trial must be in writing and state with particularity the grounds therefor. When the motion is granted under Rule 59 (b), supra, note 2, no grounds are required by the rule. However, if a new trial is ordered under Rule 59(d), supra, note 1, the court must specify its reasons because it is on the court's own initiative.

Southern Pac. Co. v. United States District Court, 9 Cir., 1951, 190 F.2d 735, 737, this court stated as follows:

> "Indeed, the order granting a new trial, refers specifically to 'plaintiff's motion for a new trial.' The presumption that official action was regularly performed would seem to require us to resolve any possible ambiguity in the order in favor of a holding that the court acted upon [the] motion, with respect to which it still had jurisdiction to act."

However, appellant contends that the cases and statute cited after the written words in the order are concerned solely with the inadmissibility of truth in a trial under California law, where truth was not pleaded as a defense. It is then argued that since the admissibility of truth was not questioned or raised in the motion for a new trial, the court was acting on its own initiative and was therefore without jurisdiction.[5]

The statute cited in the order, California Civil Code Section 47, Subdiv. 2(3), delineates the necessary elements of privilege as a defense where defamatory allgations are made in a judicial proceeding.[6] No reason

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[5]Appellee did urge in her motion that the question of falsity should have been included by the pleadings as an issue in the second cause of action, requiring a finding as to truth by the court, but no question was raised by appellee as to the admissibility of evidence relatng to truth.

[6]California Civil Code, Sec. 47, Subd. 2 (3) provides, in part, as follows:

"A privileged publication or broadcast is one made—* * *

"2. In any * * * (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce * * * shall not be a privileged publication * * * unless such pleading be verified * * * and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation * * * and unless such allegation * * * be material and relevant to the issues of such action."

is urged by appellant as to why the court cited the statute, nor do we assign one except in so far as the court thought that the statutory elements of privilege in a verified cross-complaint had not been properly established, and a new trial must be had in regard to that second cause of action.

In the first case cited in the order, *Tingley v. Times Mirror Co.*, 1907, 151 Cal. 1, 26, 89 P. 1097, 1107, the California Supreme Court discusses, at the page cited, the common law pleas of justification and mitigation. It held that since the defendant had not pleaded truth, nor alleged facts which would establish truth, there was no justification for the particular libel. Further, the court held that the defendant's plea in mitigation was insufficient, because in order to establish such plea it was necessary to allege knowledge of the facts set up in mitigation prior to publication of the libel, as well as believing them true after due investigation. No such allegations were present. The court concluded that in absence of pleas of justification or in mitigation, evidence of facts bearing on knowledge or truth of the libel was inadmissible and properly excluded.

In the second case, *Davis v. Hearst,* 1911, 160 Cal. 143, 195, 116 P. 530, 552, the court discusses the common law plea of justification in regard to libel. It held that where justification was pleaded, the defendant could also plead his good faith belief of all facts within his knowledge at the time of the publication, even

if they tended to establish truth. The court also stated that circumstances in mitigation, though not pleaded by the defendant, could nevertheless be proven if they did not go to the truth of the libel. It construed *Tingley v. Times Mirror Co.,* supra, as showing a situation where the plea in mitigation must be pleaded because going to the truth of the libel. Finally, the court held as follows in regard to the particular evidence presented:

> "This evidence was offered in mitigation as tending to prove the truth of the charge * * * Therefore it could and should have been pleaded in mitigation with an allegation of the knowledge of the defendants of the fact *at the time of publication.* For there is this broad distinction between a plea in justification and evidence of the truth given in mitigation: The truth, whenever discovered, is a complete defense to the defendant. *But to repel the conception of malice in the publication only so much of the truth as the defendant knew at the time of the publication can avail him." Davis v. Hearst,* supra, 160 Cal. at page 195, 116 P. at page 552. (Emphasis supplied.)

The significance and meaning of the above cited cases is not clear. It is difficult to say unequivocally that the cases refer only to the first portion of the order, namely, granting the new trial. For the second part of the order states "* * * that in all other respects the motion for a new trial is hereby denied." It is not unlikely that the cases were intended to refer to the denial of the

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motion in respect to the first and third causes of action, where truth was pleaded as an affirmative defense. If this is so, regardless of the validity of the reasons for which the cases appear, the citations have no significance here; the first and third causes of action are not at issue. Since the cases, at the pages cited by the court, deal with the general problem of pleading and proving mitigation and justification in defamation, it is not improbable that they were intended as an explanation or authority for the two denials.

More probably, however, assuming that the cases refer to the second cause of action, they could easily refer to the proposition stated therein that in order to establish "mitigation" or good faith and lack of malice, it must be shown that the defendant knew mitigating facts "at the time of the publication." Since truth was not pleaded, only those facts known when the complaint was published would satisfy California Civil Code Section 47 requiring specifically that the allegations be made by the defendant in good faith and without malice.

As stated previously, appellant pleaded truth as an affirmative defense to the first and third causes of action. Evidence of truth was therefore admitted at the trial. However, since appellant simply pleaded privilege, and not truth, as a defense to the second cause of action, only such evidence as tended to show good faith and lack of malice at the time of publication could be considered by the trial court in determining whether

that defense had been established. It is reasonable to assume that the lower court weighed and considered the evidence of truth presented at the trial in connection with the second cause of action, but did not limit its consideration to appellant's knowledge at the time of publication. The ultimate basis for the order granting the new trial, then, would be the lack of sufficient evidence to establish good faith and lack of malice as required by statute. Insufficiency of evidence, of course, was the very ground urged by appellee in her motion, quoted above. The order, following the grounds stated in the motion, could not stem from the court's own initiative and would be timely.

At most the cited material in the order is ambiguous. It cannot be said to supply "the" reason for the court's order. If a reason must be assigned, we think the one explained above following the grounds stated in the motion is more reasonable. Indeed, it is doubtful whether such citations amount to "reasons" at all within the meaning of Rule 59(d). In any case, the order was not made on the court's own initiative, but grounded on appellee's motion for a new trial. We hold that the lower court had jurisdiction to issue its order because it was based on a timely motion. Consequently, the order is not appealable. In view of this conclusion it is unnecessary to decide whether the court had the power to grant the motion on a ground not stated therein.

The appeal is dismissed.

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